FILE COPY

Office Supreme Court, U.S.
FILED
MAY 20
JAMES R. BROWNING

IN THE

Supreme Court of the United States

October Term, 1959

No. 886 831

AMERICAN LEGION POST NO. 51,

Defendant Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff Appellee

On Appeal from the Supreme Court of Pennsylvania, Western District.

MOTION TO DISMISS

FRANK P. LAWLEY, JR.
Deputy Attorney General
ANNE X. ALPERN
Deputy Attorney General

Department of Justice
Commonwealth of Pennsylvania
State Capitol
Harrisburg, Pennsylvania

Murrelle Printing Company Law Printers 201-3 Lockhart St. Sayre Pa.

INDEX TO BRIEF

	Page
Motion To Dismiss	1
Statement	2
Questions Presented	4
Argument	5
Conclusion	6

TABLE OF CASES

Archbishop O'Hara's Appeal, 389 Pa. 35, 131 Atl. 2d 587	5
Bailey v. Anderson, 326 U.S. 203, 206, 66 S. Ct. 66, 90 L. Ed. 3	5
Brown v. Massachusetts, 144 U.S. 573, 580, 12 S. Ct. 757, 36 L. Ed. 546	5
Hulbert v. Chicago, 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026	5
John v. Paullin, 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381	5
Montgomery County Bar Association v. Rinalducci, 329 Pa. 296, 197 Atl. 924	5
Sayward v. Denny, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941	5
United States v. Korpan, 354 U.S. 271, 77 S. Ct. 1099, 1 L. Ed. 2d 1337 (1957)	2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 188

American Legion Post No. 51,

Defendant-Appellant

v.

Commonwealth of Pennsylvania,

Plaintiff-Appellee

On Appeal from the Supreme Court of Pennsylvania, Western District.

MOTION TO DISMISS

Appellee in the above-entitled case moves to dismiss the appeal on the following grounds:

1. The Federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the courts of Pennsylvania.

2. The appeal does not present a substantial Federal question.

STATEMENT

On June 20, 1957, the Commonwealth instituted an *in rem* proceeding under the Act of March 31, 1860, P. L. 382, §60; 18 P.S. §1445, seeking the forfeiture and destruction of certain multiple-coin pinball machines on the ground that they were gambling devices *per se*. The same type of machines were before this Court in the case of *United States v. Korpan*, 354 U.S. 271, 77 S. Ct. 1099, 1 L. Ed. 2d 1337 (1957) (R. 414a-416a).

Appellant filed an answer to a petition which sought the destruction of the machines, but did not raise therein any State or Federal Constitutional questions (R. 12a-15a). At the hearing before the trial court, Appellant did not raise any Federal Constitutional questions, and the trial court's opinion [1] ordering the forfeiture and destruction of the machines, does not mention, discuss or pass upon any such questions.

On appeal to the Superior Court of Pennsylvania no Federal Constitutional questions were raised. In fact, Appellant's brief in that court stated the questions to be as follows:

"QUESTIONS INVOLVED

"Did the Court below err in holding that multiple-coin pinball machines were gambling devices *per se* where there was no evidence in the record to prove that such machines:

[1] *Trambetta Return*, 16 Pa. D. & C. 2d 363 (1958

"A. Were used or employed as gambling devices, or

"B. Were so constructed that they could be used solely for unlawful purposes?

(Negatived)."

The opinion of the Superior Court[2] does not mention, discuss or pass upon any Federal Constitutional questions.

A petition for leave to appeal to the Supreme Court of Pennsylvania was granted, but no Federal Constitutional questions were presented therein. Appellant's brief therein stated as the issues involved, the same question (previously quoted) presented to the Superior Court. The *per curiam* affirmation by the majority of the Supreme Court does not mention, discuss or pass upon any Federal Constitutional questions.[3]

After decision in a petition for reargument, which was denied without opinion by the State Supreme Court, Appellant for the first time made general averments intended to raise Federal Constitutional issues.

---

[2] *American Legion Post No. 51 Appeal*, 188 Pa. Superior Ct. 480, 149 A. 2d 483 (1959).

[3] Appellant attempts to comply with Rule 15 1(d) of this Court by making reference to the dissenting opinion of one Justice as indicating that the State Supreme Court "considered the federal constitutional problems". The statement in a footnote to Justice Bell's opinion relates to the constitutionality of a *different penal statute from the one directly involved in this case.*

QUESTIONS PRESENTED

1. Where Federal Constitutional questions are not raised in proceedings under a state penal statute involving the seizure of multiple-coin pinball machines as gambling devices, either in the state trial or appellate Courts, and the opinions and orders of such Courts do not mention, discuss or pass on any Federal questions, does the jurisdiction of the Supreme Court of the United States attach on appeal from a state judgment ordering the destruction of such machines?

2. Where a state statute authorizes the seizure and forfeiture of gambling devices, and the sole issue presented to the state Courts is the interpretation of such statute as applied to multiple-coin pinball machines, but the constitutional validity of the statute is not challenged, is there a substantial Federal question involved?

ARGUMENT

1. THE FAILURE TO RAISE FEDERAL CONSTITUTIONAL QUESTIONS IN THE STATE COURTS

Prior to the final judgment of the Supreme Court of Pennsylvania in this case, appellant did not raise any Federal Constitutional questions. The validity of the state statute involved was never challenged. The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a state court, it must appear that the Federal questions involved were raised in the state courts at the proper time: *Hulbert v. Chicago*, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026; *Brown v. Mass.*, 144 U.S. 573, 580, 12 S. Ct. 757, 36 L. Ed. 546; *John v. Paullin*, 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381.

Appellant's attempt to raise such questions in a petition for rehearing *after* judgment was, we submit, improper: *Sayward v. Denny*, 158 U.S. 180, 15 S. Ct. 777, 39 L. Ed. 941. In any event, the petition was denied without opinion: Cf. *Bailey v. Anderson*, 326 U.S. 203, 206, 66 S. Ct. 66, 90 L. Ed. 3.

Further, the law of Pennsylvania requires that constitutional questions be raised in the trial court and, if not, they will not be considered on appeal: *Archbishop O'Hara's Appeal*, 389 Pa. 35, 46, 131 A. 2d 587; *Montgomery County Bar Association v. Rinalducci*, 329 Pa. 296, 298, 197 A. 924.

2. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

Appellant submits that Federal constitutional questions may not be presented to your Honorable Court unless the precise questions have been placed in issue before the state courts. This basic procedural requirement is completely absent in this case.

At all stages, this case has involved only the interpretation of a state statute as applied to multiple-coin pinball machines, and was decided solely on the basis of state law. Appellant's jurisdictional statement confirms this fact in explaining the decision of the Superior Court (page 7).

CONCLUSION

For all of the foregoing reasons appellee moves that this appeal be dismissed.

Respectfully submitted,

FRANK P. LAWLEY, JR.
Deputy Attorney General

ANNE X. ALPERN
Attorney General